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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 685

THE SUPERIOR OIL COMPANY,
Cross-Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement	4
Procedural History	6
The Commission's Opinions	7
The Court of Appeals Opinions	9
Reasons for Granting the Writ	12
Conclusion	22

CITATIONS

Cases

Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co., 393 U.S. 87 ..... 3, 10, 16

Federal Power Com. v. Hope Natural Gas Co., 320 U.S. 591 3

Federal Power Com. v. Idaho Power Co., 344 U.S. 17 15

Federal Power Com. v. United Gas Pipe Line Co., 393 U.S. 71 15

Securities & Exchange Com. v. Chenery Corp., 318 U.S. 80 and 332 U.S. 194 15

Permian Basin Area Rate Cases, 390 U.S. 747 ..... 3, 4, 5, 7, 9, 10, 14, 15, 16, 19, 20, 21

Sunray Mid-Continent Oil Co. v. Federal Power Com., 353 U.S. 944 (1957) 14, 15

United States v. United States Gypsum Co., 333 U.S. 364 ..... 4, 20

Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 20

Statutes

	PAGE
Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w	4, 6, 14
§ 4	4, 21
§ 5(a)	4, 21
§ 7(e)	4
§ 16	4
§ 19(b)	2, 4, 7, 12

Miscellaneous

Commission Orders:	
Presiding Examiner's Initial Decision on Southern Louisiana Area Rates, 40 FPC 703	2
Opinion No. 546. Opinion and Order Determining Just and Reasonable Rates for Natural Gas Producers in the Southern Louisiana Area, 40 FPC 530	2
Opinion No. 546-A. Opinion and Order on Rehearing Modifying in Part and Confirming in Part Prior Opinion and Order and Denying Motions for Stay, 41 FPC 301	2

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The Superior Oil Company conditionally cross-petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 14, 1970 in the event any such petitions filed by other parties below are granted by this Court.

OPINIONS BELOW

The Opinion of the Court of Appeals and its Opinion on Rehearing are not yet reported. The Opinions and Orders of the Federal Power Commission are reported at 40 FPC 530 and 41 FPC 301. The Opinion of the Hearing Examiner [111 J. A. (1) 62d — 447d] is reported at 40 FPC 703. The referenced Opinions of the Court of Appeals and those of the Federal Power Commission are separately presented, as Appendices A, B, D & E, respectively, of Petition for Writ of Certiorari of Continental Oil Company, et. al., which said Appendices are hereby adopted for the purpose of this Conditional Cross-Petition for Writ of Certiorari.

JURISDICTION

The Opinion of the Court of Appeals was entered on March 19, 1970 (Appendix A, pp. 1-70) and was clarified by an opinion and order denying petitions for rehearing entered on June 16, 1970 (Appendix B, pp. 1, et seq.). Judgment as mandate was issued July 14, 1970 (Appendix C, p. 1).

We invoke the jurisdiction of this Court under 28 U.S.C. 1254 (1) and Section 19(b) of the *Natural Gas Act*, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

In light of the Opinions and Judgment below, Superior opposes the granting of petitions for writs of certiorari in this case on grounds that such petitions are premature and questions raised thereby are not yet ripe for review by this Court. However, if this Court concludes otherwise and grants petitions filed by any other parties, the following questions necessarily are also presented:

1. WHETHER THE COURT OF APPEALS ERRED IN REFUSING TO ENTER AN ORDER REMANDING THIS CASE TO THE FEDERAL POWER COMMISSION WHEN THE COMMISSION ITSELF HAD FORMALLY REQUESTED SUCH A REMAND.

2. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING AN ORDER OF THE FEDERAL POWER COMMISSION WHICH REDUCED PRODUCER RATES AND PROVIDED FOR REFUNDS WITHOUT FINDINGS ON THE SUPPLY OF GAS EXPECTED TO RESULT FROM SUCH RATES OR THE DEMAND FOR SUCH GAS, THUS FAILING TO ASSESS THE END RESULT OF ITS ORDER AS REQUIRED BY THIS COURT IN ITS *HOPE*[1] AND *PERMIAN*[2] DECISIONS.

3. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING AN ORDER OF THE FEDERAL POWER COMMISSION WHICH ESTABLISHED AREA CEILING RATES PRIMARILY ON THE BASIS OF UNIT COSTS BASED ON IMPRECISE ALLOCATIONS OF COMPOSITED AVERAGE COSTS AND ESTIMATED FUTURE UNIT COSTS OBTAINED FROM STALE DATA, A LARGE PART OF WHICH WAS NEITHER TYPICAL NOR REPRESENTATIVE OF THE COSTS INCURRED AND TO BE INCURRED IN THE AREA INVOLVED, ALL CONTRARY TO THIS COURT'S HOLDING IN *BALTIMORE & OHIO R. CO. v. ABERDEEN & ROCKFISH R. CO.*, 393 U.S. 87.

4. WHETHER THE COURT OF APPEALS ERRED IN HOLDING UNIT COSTS AND AREA CEILINGS FIXED THEREFROM AS FOUND BY THE COMMISSION TO BE SUBSTANTIALLY SUPPORTED WHEN CERTAIN ELEMENTS OF SUCH COSTS WERE SUPPORTED BY A SIX-

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[1] *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603.
[2] *Permian Basin Area Rate Cases*, 390 U.S. 747.

GLE EXPERT WITNESS BASED UPON A FACTUAL ASSUMPTION OF THE WITNESS OTHERWISE SHOWN TO BE FALSE AND ERRONEOUS.

5. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING COMMISSION ORDERS BASED UPON ACCEPTANCE OF DOWNWARD PROJECTIONS OF COST DATA FOR A PRIOR YEAR SHOWN TO BE EXCESSIVE AT THE TIME OF THE COMMISSION DECISION CONTRARY TO THE PRINCIPLE OF THIS COURT'S DECISION IN *UNITED STATES* v *UNITED STATES GYPSUM COMPANY*, 333 U. S. 364 at 395.

6. WHETHER THIS COURT SHOULD RECONSIDER ITS *PERMIAN* DECISION AFFIRMING COMMISSION METHODOLOGY FOR ESTABLISHING AREA RATE CEILINGS AND REFUNDS OF COLLECTIONS IN EXCESS THEREOF WHEN EXPERIENCE HAS SHOWN THAT SUCH METHODOLOGY HAS RESULTED IN RATES WHICH WILL NOT PRODUCE SATISFACTORY LEVELS OF EXPLORATION, DEVELOPMENT AND PRODUCTION RELATIVE TO THE REQUIREMENTS OF THE GAS CONSUMING PUBLIC.

STATUTES INVOLVED

Sections 4, 5(a), 7(e), 16 and 19(b) of the *Natural Gas Act*, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, (frequently referred to herein as the *Act*) are involved and are reproduced in Appendix F, pp. 1-8 of the Petition for Writ of Certiorari of Continental Oil Company, et al., adopted herein by this reference to avoid duplication.

STATEMENT

This is an area rate case under Sections 4 and 5 of the *Natural Gas Act*, supra. The Commission decision and orders to be effective October 1, 1968 were based primarily

upon 1960 data and prescribed ceiling rates for sales of natural gas produced onshore and offshore Southern Louisiana, the source of approximately one-third (1/3rd) of the nation's entire interstate natural gas supply. The effect of the ceilings fixed was a reduction of area producers' revenues by $49 Million per year (Appendix D, p. 176). and the order provided for the ordering of refunds estimated to amount to $190 Million as of September 30, 1968.

At the time of the Commission decision there was mounting evidence of an increasing shortage of natural gas throughout the United States. Today the fact of shortage is recognized among all segments of the natural gas industry[3] and has brought about the taking of emergency action[4]. The Court of Appeals concluded that the supply of gas is dangerously low and the effect of the prescribed rates upon the industry's capital requirements in the light of required exploratory effort had not been properly considered by the Commission. Pointing to a number of deficiencies in the Commission decision in the light of this Court's *Permian* decision, supra, and with express "misgivings" the Court of Appeals nevertheless affirmed, holding that the Commission could stay, rescind and set aside its opinions and orders to remedy such deficiencies, and assumed that the Commission would do so if warranted by current data. On rehearing with questions raised as to such an "affirmance" the Commission filed a formal request for remand,[5] notwithstanding which, the Court of Appeals

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[3] A study by the Commission Staff released in late 1969 eliminated any question on this subject.

[4] Importation of LNG at prices equivalent to approximately 75¢ per Mcf during summer months and $1.44 during winter months, wholesale was authorized as recently as August 28, 1970.

[5] As the result of specific questions from the Court, Chairman Nassikas and Commissioner O'Connor dissenting.

again "affirmed", but held, as a part of the remedy, that the Commission should re-assess its opinions and orders and make any changes found necessary affecting revenues from gas delivered or to be delivered, and any other matters.

This Cross-Petition by Superior is conditional because unless this Court entertains other petitions questioning the decision by the Court of Appeals, further inquiry by the Commision into its prior opinions and orders, and modifications and recision thereof as may be found necessary as contemplated by the Opinion of the Court of Appeals, will render all questions which may now be presented premature and not ripe for review. However, if this Court should grant petitions filed by other parties, Superior submits that the questions presented by this Cross-Petition necessarily also are timely and their consideration is urged.

Procedural History

The case was instituted on May 10, 1961. Cross-Petitioner was a Respondent before the Commission along with all other gas producers in the area, as well as pipelines, distributors, and interested state commissions. The Commission's original decision Opinion No. 546 (Appendix D, pp. 1-258) was issued September 25, 1968. Timely applications for rehearing and motions for stay were filed under Section 19(a) of the *Act*. In separate motions for reopening of the record, Superior and others sought admission of more current evidence reflecting the national gas supply situation, rising costs, and other data relevant to rate fixing [See IV J.A.(I) 943d and 957d]. The Commission on March 20, 1969 issued its rehearing Opinion No. 546-A (Appendix E, pp. 1-112) denying the applications, motions for stay, motions for limited reopening, and modifying its original opinion in part only.

Timely petitions for review were filed pursuant to Section 19(b) of the *Act*, supra, in the Court below, to which the Commission duly certified the record. Motions for leave to adduce additional gas supply evidence were made to the Court, without success. The Court's affirming Opinions and Judgment have been mentioned above.

The rate reducing orders of the Commission decision have never become effective as the result of Commission and Court successive stays, the present stay being ordered by the Commission after the Court's decision. Motions by Superior and others to reopen and reconsider its prior orders have not been acted on by the Commission.

The Commission's Opinions

With excessive reliance on *Permian* results, the Commission prescribed area ceiling rates based on unit costs. The Commission costing was derived from the compositing of investment, costs, and expenses, to reach averages. Issues raised here involve the determination of unit costs to fix rates. Particular reference is made to errors in lease acquisition and drilling costs as computed in new gas costs. As to flowing gas costs, the issue raised relates to use of non-representative and atypical averages for fixing area costs.

In a dissenting opinion on rehearing, (Appendix E, pp. 104 and 106), Commisioner John A. Carver, Jr. pointed out that the record supports fixing just and reasonable rates at higher levels referring particularly to the nature of the Commission's choice in fixing successful drilling costs; i.e.:

> "With apparent mathematical certainty, 1958 Census drilling costs were downtrended 5.8%. The Commission's 'own conclusions' obviously do not provide the 5.8% factor. The figure selected traces to the 'success-

ful well allowance, as to which there were four separate witnesses, as follows:

Witness	Sponsor	Estimate
Robert H. Park	Producers	3.94¢
Stephen E. Sherwin	Producers	3.30¢
Harold L. Spain	FPC Staff	3.28¢
Herman G. Roseman	Distributors	2.88¢

Witness Roseman's estimate of 2.88¢ was based on the 2% downtrending factor; reversing it would substitute a figure of 3.0¢ per Mcf for this item of cost, a net difference of 0.12¢ per Mcf. The producers also contended for revised footage figures which would have increased the figure to 3.40¢ per Mcf, or a total increase of 0.52¢ — still well below the estimate made by the Commission's own witness, Dr. Spain.

"The calculation of the cost per successful gas foot in Opinion No. 546 was $16.89 (page 37). The record shows that the Joint Association Survey cost figure was $18.57. This would calculate to an additional allowance of 0.29¢ per Mcf."

And with reference to Dry Hole Costs:

"Similar to successful well costs, the 'dry hole' calculation was derived from testimony as to which there was variation among the witnesses as follows:

Witness	Sponsor	Estimate
Robert H. Park	Producers	1.58¢
Stephen E. Sherwin	Producers	2.30¢
Harold L. Spain	FPC Staff	2.08¢
Herman G. Roseman	Distributors	1.42¢

"The Commission followed Roseman, the lowest estimator, who used as underlying support an estimate of $9.51 per foot of dry-hole drilling costs, after making his own judgmental adjustment to Census data which showed $8.92. The 1960 Joint Association Survey figure was $10.56 per foot, and if that record figure were substituted, the allowance would be 1.61¢ per Mcf, still well below Staff witness Spain's estimate,

and indeed lower than any witness except Mr. Rose-man, whose estimate was accepted. The difference is 0.19¢."

Commissioner Carver emphasized the issue of whether the prices fixed would elicit present and future gas supply inasmuch as "* * * a serious problem of gas supply has been identified, requiring action *in this case*." (Appendix E, p. 74). He viewed "incentive" as negated by the roll back in rates, particularly because revenues from gas previously found and sold are the major source of capital funds for new investment, and regarded refunds and rate reductions as retroactive expropriation of the "incentive" which had theretofore induced commitment to interstate commerce.

The Court of Appeals Opinions

Despite affirmance, the thrust of the Opinions of the Court of Appeals is that the Commission failed to follow this Court's admonitions in *Permian*, supra, on the supply problem and related issues. Stating that its affirmance does not reflect full satisfaction with the performance that the Commission turned in "* * *" (Appendix A, pp. 2-3), the Court concluded that the Commission was permitted "to stay, modify or rescind any part of its order, notwithstanding our affirmance, if circumstances appearing since the issuance of the orders make a change advisable." (Appendix B, p. 2). Between these statements the Court found more than ample grounds to reverse the Commission on each of the questions now presented.

On questions involving the Commission's findings on cost, the Court of Appeals was "troubled" but found *Permian* controlling. At the same time, the Court stated its agreement with Commissioner Carver's dissenting view "that the Commission should not have relied upon cost

calculations floating in a vacuum but should have reviewed its computations in light of supply, demand, and other market forces * * *" (Appendix A, pp. 45-46).

The Court found no merit in the argument that area costs founded on national data only was not substantially supported because the national data contained seriously distorting elements as applied to Southern Louisiana, and held that *Baltimore & Ohio R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87, was not controlling here because the Examiner found national data to be the best available index to the area costs. (Appendix A, pp. 42-43)

The Court of Appeals found "* * * the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Appendix A, pp. 49-50), and listed defect after defect in "findings" on related questions of supply, demand, and actual availability of capital to the industry at rates prescribed (Appendix A, pp. 46-60). The Court referred to more current data available to the Commission, including the study by the Commission's Staff released in October 1969, which indicates "perhaps a certainty, that the supply of gas is dangerously low" and "a serious shortage, in fact, may already be unavoidable". (Appendix A, p. 62). It found that "as to the crucial issue of sources for adequate financing, the Commission's findings, and for that matter the evidence, are almost non-existent." (Appendix A, p. 63). In sum, the Court found that the crucial assessment of facts, as to supply and demand, and the impact of prescribed rates on that supply and demand called for by *Permian* had not been made in this case. The Court below held that "affirmance" is not a "judgment that the supply problem is not serious enough to require immediate modification of the order herein sustained" (Appendix A, p. 59).

Petition for rehearing by this Cross-Petitioner urged that reversal and remand were required in light of the deficiencies found. We also raised the question of whether an "affirmance" would leave the Commission with the power to vacate, modify, or rescind its prior orders, as contemplated by the Court. Before acting on rehearing the Court directed the Commission to respond to two specific questions concerning its power in such circumstances.[6] In response, the Commission (1) took the position that it would not "have authority to permit any *retroactive* increases or decreases in a rate order, unless authorized to do so by a court", and (2) the Court had "full statutory power to authorize or instruct the Commission" to "reconsider" the record or "reopen the record" for specific purposes "without necessarily reversing the Commission and vacating the order for a new hearing". It requested clarification of the Court's intent to authorize "retrospective adjustments" in light of its "use of the words 'sustained in full'"; and then requested a "remand" of the case so "that the Commission could discharge its regulatory responsibilities consistent with the Court's opinion."[7]

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[6] The full text of the questions posed by the Court is:

"(1) Whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.

"(2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify or rescind the order if the circumstances seem to make these actions advisable."

[7] "Response of Federal Power Commission to Petitions for Rehearing and Request for Remand", pp. 2-5 (Chairman Nassikas and Commission O'Connor did not concur in the request for remand)."

On June 16, 1970, the Court denied the Petitions for Rehearing and the Commission's request for remand stating that "affirmance of the Commission's orders is structured so as to allow the Commission great flexibility" (Appendix B, p. 1). The Court 'pointed' to its remedial powers under Section 19(b) of the Act and held, ". . . pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so". It was emphasized that on reopening, all issues including modification of rates, and the disposition of refunds if any, to be ordered were to be considered. (Appendix B, pp. 2-3).

REASONS FOR GRANTING THE WRIT

1. Importance of this case to all segments of the natural gas industry and all classes of consumers cannot be overstated. The shortage of natural gas recognized by the Court of Appeals is directly involved here because the rates prescribed apply to the pricing area that now provides up to one third of the total national gas supply, and serves more than one-half of the consuming population of the United States. These rates were fixed primarily on the basis of 1960 cost data considered in a vacuum. There was little or no regard for the impending supply shortage, rising operating costs, increased taxation under the Tax Reform Act of 1969,[8] the erosive effects of inflation, and the compelling urgency for increased national and area

[8] Peculiarly severe for the gas and oil industry, depletion was reduced percentage wise to 22% from 27½% and a minimum tax of 10% of certain percentage depletion utilized to reduce taxable income was enacted.

exploratory attempts to find supply to meet increased demand.

Under the Commission orders amounts now exceeding $375 Million, including interest, would be "refunded" to pipeline companies.

Said refund amounts have accrued in largest part since 1960. Such amounts, revenue when received even though subject to refund, with other internally generated revenue have been used for past operations including exploration and development. Notwithstanding such use, the level of new findings of gas supply during the decade 1960-1970 has been completely inadequate to meet the increase in demand. The past inadequacy of exploration will necessarily be accentuated in the future if the refunds and rate reductions ordered are carried out. Cash on hand is necessary for exploration.

Continued and increasing insufficiency of gas findings will work to the disadvantage of the industry and even more to the disadvantage of the public. Inevitably more must be paid for gas. The consuming public has only the alternative of paying more for a diminishing amount of gas or of paying more for a constant and hopefully increasing supply.

Producers' annual revenues under the present order will be rolled back to levels of the 1950's and from such reduced revenue the ordered refunds must be paid. There will be little if any industry money left for any exploration.

The vital question now is how best to remedy the situation as promptly and as equitably as possible. To that end, the Court of Appeals fashioned a remedy which will permit the Commission to take the corrective steps dictated by present circumstances and known facts, including modification and rescission of the orders reviewed below as

may be required. Said Court recognized that harm done cannot be undone.

Should this Court grant any petitions for certiorari directed to the power of the Circuit Court of Appeals to create the above remedy as fashioned by it, then it must be acknowledged that the "affirmance" below is based upon misinterpretation of the *Act* but for which the case would have been "reversed".

"If the corrective measures contemplated by the Court below are not undertaken, then reversal and remand is now justified because of the deficiencies in the Commission decision shown by the opinions of the Court below strengthened by the request by the Commission itself for a remand. Rarely is there concert of plea for further and corrective action by the Court, the agency, and most petitioners for review. Whenever such concert occurs, the plea should be granted."[9]

Certainly, if the Court below erred in holding that the Commission has the power to rescind its orders in light of the Court's affirming opinion, it must also have erred in permitting finality to opinions and orders which it found to conflict with *Permian* and other decisions of this Court.

The Court of Appeals stated, quite plainly, its disapproval of the Commission's "performance", and that the Court had "little inclination to join the Commission in presiding over" the possible "result" of a predicted "severe gas shortage" (Appendix A, p. 47 FN 87). The "performance" disapproved of, the failure to recognize the then approaching gas shortage or to appraise the effect of the ceilings

[9] *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 353 U.S. 944 (1957).

fixed on new gas supply are enough to require reversal and remand to the Commission for correction.[10]

Beyond this, a formal request for remand by the respondent agency which, if not a confession of error, certainly is a confession of possible error which the agency would like the opportunity to correct, clearly should have been granted. The same deference to agency expertise should extend to request for remand[11] that is paid other agency orders.

2. On the issue of adequate supply, this Court's mandate to the Commission in *Permian* was plain, requiring Commission "assessment of the consequences of its orders for the character and future development of the industry[12]. Here where adverse consequence to the industry is so apparent, failure to heed this Court's *Permian*[13] mandate is inexcusable. Remand with instruction would have been proper.

Further, the Court below found that the Commission's conclusion that the rate of return "should foster an active exploration program consistent with both the financial needs of the industry and the protection of the public in-

[10] *Federal Power Commission* v. *United Gas Pipe Line Co.*, 393 U.S. 71. See also *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 332 U.S. 194; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17; and *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, supra, p. 14.

[11] Indicated in the Commission's response to the Court below to have been determined by Commission majority inasmuch as there were two noted dissents. See FN 5, supra.

[12] *Permian Basin Area Rate Cases*, 390 U.S. 747, 792.

[13] "* * * the Commission evidently believed that price should be employed functionally as a tool to encourage the production of appropriate supplies of natural gas. A price is thus just and reasonable within the meaning of §§ 4(a) and 5(a) not merely because it is 'somebody's idea of return on "rate base"' but because it results in satisfactory programs of exploration, development and production." 390 U.S. 747, 796.

terest, while specific, was useless to the reviewing court "because the Commission has simply stated a figure floating in a vacuum" and concluded without more that this figure will "foster an active exploration program". This Court's holding in *Permian*, supra, that the Commission must indicate fully and carefully the method by which and the purpose for which it has chosen to act[14] thus was disregarded and remand was required.

3. It escaped the Court below that the litigants were not drawing a comparison between gas wells and a railroad but had assigned as error that national cost data is not typical of Southern Louisiana costs. The typicality of evidence and reasoned findings therefrom which this Court required in *Baltimore & Ohio R. Co.*[15], *supra*, cannot be present where the Court below conceded that the composited national costs complained of consisted of "* * * inclusion of areas that are not of the same character as this region". (Appendix A, pp. 42-43). Such inclusion of atypical and non-representative areas necessarily distorted the composite result applied to Southern Louisiana.

The inadequacy of the imprecise allocations, composited averages and estimated future unit costs Petitioner complains of were best expressed by Commissioner Carver in his dissenting opinion. (Appendix E, p. 111).[16]

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[14] *Permian*, supra, at pp. 792.

[15] "The requirement for administrative decisions based on substantial evidence and reasoned findings — which alone make effective judicial review possible — would become lost in the haze of so-called expertise." 393 U.S. 87 at p. 92.

[16] "*Permian* stands for the idea that Southern Louisiana and other area rate cases subsequent to *Permian* should reflect a better quality of analysis. I think that Opinion No. 546 disappoints in this respect. The petitions for rehearing presented an oppor-

4. Petitioner is unable to tell to what extent the Court below gave any serious consideration to the cost calculations made by the Commission, which in large measure were adopted without change from the testimony of the witness Herman Roseman[17].

This witness testified that he was an "economist statistician" but had never had any first hand experience with the oil industry, nor with drilling practices of the industry, nor with respect to oil or gas well spacing. He determined industry lease acquisition costs to be 26.4% of industry drilling costs based upon a data series he selected, and then testified: "I related industry lease acquisition investments to industry well drilling costs because I had no basis for assuming that the ratio was any different in gas than it was in oil."

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tunity to correct errors; and although some have been corrected in the larger matter of costing ambiguities, Opinion No. 546-A is even more disappointing. My analysis of a selected group of the costing issues forces a conclusion that precision and certainty are simply not to be found.

"We may share and sympathize with the 'numbers' reaction expressed by the Court of Appeals, Tenth Circuit, in its consideration of *Permian* (375 F.2d 6, 24). But the 'assumptions, allocations, formulae, equations, averages, means and calculations' so plaintively described by that Court are the grist of Commission responsibility. They ought not be left to staff expertise, but rather should be given the scrutiny their impact on the final result suggests."

[17] The Court below contented itself with saying "We reject the contention that cost pricing is so imprecise as to make its use unlawful and hold that the Commission's findings here are based upon substantial evidence" and by footnote added: "We have inspected the Commission's findings as to each of the cost items attacked by the producers with some care. Although we do not discuss each individually, in order not to lengthen an already lengthy discussion we find each to be supported by substantial evidence" (Appendix A, p. 46 and FN 85).

What the witness failed to recognize was that this record showed with particularity that the density of development of an oil reservior ranges typically from one well to five acres to one well per 80 acres [(1) J. A. (1)p. 128] while similar development in a gas reservoir varies between one well to 160 acres and one well to 640 acres [(1) J.A. (1) p. 128]. Leases are acquired on the basis of bonuses paid almost invariably fixed on a per acre basis. Therefore, the assumption in the witness' testimony that there is no basis for assuming that the ratio was any different in lease acquisition investments in gas leases than it was for lease acquisition in oil leases is completely false.

A producer witness, using different assumptions, determined that gas lease acquisition costs were approximately 10% of industry drilling costs. Witness Roseman, rebutting this producer's testimony, stated that 10% was "far out of line with available industry data". Confronted with this rebuttal statement on cross examination, however, and in response to a question from the Examiner as follows: "Are you now saying that based upon your agreement today that your assumption as to Mr. Park's method was incorrect, that you do not today contend that Mr. Park's use of a 40% ratio is far out of line with the available industry data?" Answer: "That is right" [(1) J.A. (1) p. 263-264].

In the light of the above, the 26.4% figure used by the Commission as a percentage of drilling costs to determine lease acquisition costs is totally unsupported. It was founded upon the erroneous factual assumption that the ratios of cost of acquiring oil leases and of acquiring gas leases were not different, and, after rebuttal and further cross-examination, was repudiated by the witness.

Due to the mechanical mathematical interrelation of the various elements of cost to the total cost computed by the Commission for new gas, the insufficient lease acquisition

allowance of .39¢ per Mcf translates in total to a deficiency in computed new gas cost over all of 1.75¢ per Mcf. The Court below failed to apply this Court's mandate from *Permian* to examine the Commission methods of determining costs and "decide whether each of the orders' essential elements is supported by substantial evidence". This element is totally unsupported.

5. The Commission determined 1960 drilling costs of the industry for dry holes based upon a 1958 Census of Mineral Industries' average cost per foot. It downtrended the 1958 Census figures, based upon another data series, by 3.5% for the two-year period to 1960. At the time of the Commission decision the 1963 Census dry hole cost data were available and the Commission relied upon them to support its downtrending from 1958. This they show. However, the 1963 dry hole Census figure showed a decline of only 2.57% for the intervening five years or approximately one-half of 1% per year, which would possibly justify a 1% downtrending of 1958 costs as reflected by the Census of Mineral Industries to get a 1960 figure, rather than the 3½% employed by the Commission. However the Commission adjusted downward the 1958 Census figure to reach an estimate for 1960 at a rate 3½ times greater than it should have been. This item likewise is totally devoid of evidentiary support, and points to the basis of Commissioner Carver's dissenting opinion hereinbefore quoted wherein he complained of the "apparent mathematical certainty" and "judgmental adjustment" by the witness Roseman and justifies his conclusion that in determining costs in this case the Commission not only used averages but in every case selected the lowest available figure represented.

by the averages or allocations of the averages. Excessive downtrending to fix 1960 estimated cost from 1958 Census figures is also shown as to successful well costs.

The principle of *United States* v. *United States Gypsum Company*, supra, while never applied heretofore in connection with administrative agency findings should be applicable: "A finding is clearly erroneous when although there is evidence to support it the reviewing court on the entire evidence is left with the definite and firm conviction that mistake has been committed." See also *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, pp. 487-488, having direct reference to administrative findings, to the effect that "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes (the Administrative Procedure Act and the Taft-Hartley Act) that courts consider the whole record * * *."

6. This Court should here reconsider the *Permian* decision insofar as it approved Commission methodology (use of averaged costs) for determining rates.

Commission use of industry cost averages and allocations of such averages to obtain the lowest possible cost of gas, while heretofore accepted as within Commission discretion, has been shown by experimental experience to fail to balance investor and consumer interests or to result in rates which result in satisfactory levels of exploration, development and production.

The Commission accepted findings that "additions to reserves have not been unsatisfactorily low" in the *Permian* case cannot justify a holding as in *Permian* that "the Commission permissibly discounted the producers' reliance on the reserves to production ratio. The Commission's own

Staff Report on National Gas Supply and Demand issued in 1969 showed the ratio in 1968 to be 14.6 to 1, down from that noted in this Court's opinion of 18.7 to 1 in 1963 and 17.6 to 1 in 1965. The projection in said report for 1970 was a ratio of 12.8 to 1.

Further, the same report shows 1968 reserve additions were less than production that year, only 62% thereof, and a lesser percentage is shown by other sources in 1969.

The holding of *Permian* that just and reasonable rates under § 4(a) and § 5(a) of the *Act* can be so determined because they result in satisfactory levels of exploration, development and production, not merely because it is "somebody's idea of return on a 'rate base'" clearly points to the erroneous methodology used by the Commission in that case and here as evidenced by historical result. Those rates, and the rates here proposed have been and will be insufficient to permit satisfactory levels of exploration.

Further, such rates as here proposed, based on averaged costs with the attendant obligation for refund and reduced future revenue, will require a reduction in even the past level of exploration which for the last several years has been entirely inadequate.

In *Permian* the Court recognized the forceful argument that computation of rates from costs is ultimately circular, 390 U.S. at 816, FN 99, and assumed that the Commission will continuously examine both the premises of its regulatory method and the consequences for the industry's future of its rate-making orders. Such has not been accomplished here but with practical proof of the defects in its methodology the Commission has stubbornly refused to make a significant change.

CONCLUSION

For the foregoing reasons, this Conditional Cross-Petition for a Writ of Certiorari should be granted if this Court grants other petitions for writs as to the opinions and judgments of the Court of Appeals in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The within Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on all counsel of record by mailing three (3) copies thereof, air mail postage prepaid, in accordance with Rule 33(1) this 11th day of September, 1970, and upon the Solicitor General of the United States who acknowledges receipt of same.

Frank P. Saponaro

An Attorney for Cross-Petitioner